

### **REMARKS/ARGUMENTS**

This Preliminary Amendment is filed in support to the Request for Continued Examination (RCE) application filed concurrently herewith. Claims 1-14 and 16-26 are pending in the present application. Applicant respectfully requests examination of all pending claims. Such examination at Examiner's earliest convenience is respectfully solicited.

In the Final Office Action dated May 9, 2003, claims 1-14 and 16-26 were rejected under 35 U.S.C. §102(e); and claims 1-14, 16, 17, 18, 19 and 20-26 were rejected under 35 U.S.C. §103(a). Applicant has amended claims 1, 13 and 21. Reconsideration in light of the amendments and remarks made herein is respectfully requested.

#### ***Rejection Under 35 U.S.C. § 102***

1. In the Final Office Action, claims 1-14 and 16-26 were rejected under 35 U.S.C. §102(e) as being anticipated by Wittig et al. ("Wittig"), "Network Layer Scaling: Congestion Control in Multimedia Communication with Heterogeneous Networks and Receivers", Copyright 1995. Applicant respectfully traverses the rejection and contend that a prima facie case of anticipation has not been established.

To anticipate a claim, the reference must teach every element of a claim. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." "The identical invention must be shown in as complete detail as is contained in the...claim." MPEP § 2131, p. 2100-70 (8<sup>th</sup> ed., rev. 1, 2003) (citations omitted).

Further a reference relied upon as a basis for rejection under Section 102(e) must be "(1) an application for patent . . . by another filed in the United States . . . or (2) a patent granted on an application by another filed in the United States before the invention by the applicant for patent . . . ." MPEP § 2131, p. 2100-69 (8<sup>th</sup> ed., rev. 1, 2003) (quoting 35 U.S.C. § 102(e)).

First, Wittig does not serve as a proper basis for rejection under Section 102(e). On this basis alone, the rejection is properly withdrawn.

Second, even if asserted under a proper anticipation basis for rejection of Applicant's claimed invention, it does not satisfy the requirement for setting forth a prima facie rejection.

Wittig recites a technique for network layer scaling. A router detects situations in which a resource is becoming overloaded and reports this to its scaler (Wittig, page 281). The scaler then sends a message to other routers or senders to scale the traffic accordingly. The term “filter” as used by Wittig merely denotes a media scaling device between a data source and a data sink to reduce bandwidth by dropping packets of a multimedia stream. (Wittig, p. 276).

Applicant’s claimed invention recites “at least one filter being triggered to denote when a received packet satisfies filter criteria related to differentiated service levels.”

Wittig does not disclose, either expressly or inherently, filter having criteria corresponding to an admission policy related to differentiated service levels. Wittig merely recites a network layer scaling by determining whether a network becomes overloaded and sending appropriate scaling messages or commands.

Therefore, Applicant believes that independent claims 1, 13, 21 and their respective dependent claims are distinguishable over the cited prior art references. Accordingly, Applicant respectfully requests the rejection under 35 U.S.C. §102(e) be withdrawn.

### ***Rejection Under 35 U.S.C. § 103***

1. In the Final Office Action, claims 1-14, 17, 18, and 20-26 were rejected as being unpatentable over U.S. Patent No. 6,510,164 issued to Ramaswamy et al. ("Ramaswamy") in view of Barzilai et. al. ("Barzilai"), “Design and Implement of an RSVP-Based Quality of Service Architecture for an Integrated Services Internet”, 1998. Applicant respectfully traverses the rejection and contends that a *prima facie* case of obviousness has not been established.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP § 2143, p. 2100-124 (8<sup>th</sup> ed., rev. 1, Feb. 2003)

Ramaswamy recites a user-level dedicated interface for IP applications in a data packet switching and load balancing system. The Final Office Action states that Ramaswamy discloses

at least one filter triggered to denote when a received packet satisfies filter criteria (Final Office Action, page 3).

Barzilai recites an RSVP-Based quality of service architecture for an integrated services Internet where a reservation protocol (RSVP)-based quality of service (QoS) is used. The Final Office Action states that Barzilai discloses a classifier to classify and mark one of the service levels associated with the received data packet in response to satisfying filter criteria (Final Office Action, page 3, ¶ 7). But Barzilai merely discloses a session handle carried in the buffer header used as the classifier for session specific handling of the packet (Barzilai, page 398, col. 1, ¶ 1, 7<sup>th</sup> sentence). The session handle therefore is merely a message embedded in the buffer header, not a classifier coupled to the filter to classify and mark one of the differentiated service levels. Further, Barzilai teaches away from Applicant's claimed invention. For example, Barzilai calls for the use of "a statically compiled packet filter . . . ." (Barzilai, page 411, col. 2, ¶ 2).

In contrast, Applicant's claimed invention recites, *inter alia*, an apparatus to "dynamically create and remove filters controlling access to the different service levels based, at least in part, on an admissions profile," (Claim 1) a "method for controlling provision of differentiated services . . . comprising . . . (b) dynamically creating an ingress profiler which polices admission to a particular service level" (Claim 13), and an "apparatus adapted to facilitate communications between a client device and a remote device, comprising: filter means for controlling access to differentiated service levels; . . . and control means for dynamically creating and removing a portion of the filter means based at least in part on an admission profile." (Claim 21).

A reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. MPEP 2141.03, p. 2100-122. Barzilai recitation of "a statically compiled packet filter . . . ." (Barzilai, page 411, col. 2, ¶ 2) teaches away from dynamic filter aspects of Applicant's claimed inventions.

In view of the above, there is no suggestion or motivation to combine Ramaswamy and Barzilai.

The Examiner further rejected claims 16 and 19 as being unpatentable over Ramaswamy in view of Barzilai. The Examiner takes official notice that it was well known and widely

implemented in the networking art at the time the invention was made to include logic value of a bit in a ToS field of a data packet.

Applicant respectfully disagrees. A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. (MPEP § 2141.03, p. 2100-122 (8<sup>th</sup> ed., rev. 1, Feb. 2003))

Furthermore, it would not be appropriate for the Examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. MPEP § 2144.03, p. 2100-132 (8<sup>th</sup> ed., rev. 1, Feb. 2003) Here, Barzilai teaches away from the claimed invention on the basis of the statistical filter aspect. Therefore, it is unclear if the inclusion of logic value of a bit in a ToS field is unquestionably well known.

The Examiner failed to establish a *prima facie* case of obviousness and failed to show there is teaching, suggestion or motivation to combine the references. "When determining the patentability of a claimed invention which combined two known elements, 'the question is whether there is something in the prior art as a whole suggest the desirability, and thus the obviousness, of making the combination.'" In re Beattie, Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co., 730 F.2d 1452, 1462, 221 USPQ (BNA) 481, 488 (Fed. Cir. 1984).

Therefore, Applicant believes that independent claims 1, 13, 21 and their respective dependent claims are distinguishable over the cited prior art references. Accordingly, Applicant respectfully requests the rejection under 35 U.S.C. §103(a) be withdrawn.

**Conclusion**

In view of the amendments and remarks made above, it is respectfully submitted that the pending claims are in condition for allowance, and such action is respectfully solicited at Examiner's earliest convenience.

Respectfully submitted,

BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP

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By

  
Thinh V. Nguyen

Reg. No. 42,034

Tel.: (714) 557-3800 (Pacific Coast)

12400 Wilshire Boulevard, Seventh Floor  
Los Angeles, California 90025

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Tu Nguyen

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